U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 September 2004

CASE NO.: 2003-LHC-2097

OWCP NO.: 07-160390

IN THE MATTER OF:

RICHARD A. FERRIS

Claimant

v.

CROWN OILFIELD SERVICES, INC.,

Employer

and

ACE FIRE UNDERWRITERS INSURANCE COMPANY[1]

Carrier

APPEARANCES:

ED W. BARTON, ESQ.

For The Claimant

TODD A. DELCAMBRE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

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[1] The name of the Carrier appears as amended at the hearing. (Tr. 5-6).

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Richard Allan Ferris ("Claimant") against Crown Oilfield Services, Inc. ("Employer") and Ace Fire Underwriters Insurance Company ("Carrier").

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on March 16, 2004, in Lake Charles, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 20 exhibits, Employer/Carrier proffered eight exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on May 26, 2004. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. Claimant was injured on April 13, 2001.

2. Claimant's injury occurred during the course and scope of his employment with Employer.

3. There existed an employee-employer relationship at the time of the accident/injury.

4. Employer was notified of the accident/injury on April 13, 2001.

5. Employer/Carrier filed a Notice of Controversion on June 4, 2001.

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

6. An informal conference before the District Director was held on May 22, 2003.

7. Claimant received temporary total disability benefits from May 24, 2001 through November 22, 2001 at a compensation rate of $450.03 for 26 3/7 weeks.

8. Claimant's average weekly wage at the time of injury was $675.05.

9. Some medical benefits were paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Claimant's entitlement to additional medical benefits (expenses), prior to his death, pursuant to Section 7 of the Act.

3. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Deposition of Richard A. Ferris

Claimant's deposition was taken by the parties on September 11, 2003. (CX-15). The deposition was admitted into evidence in lieu of live testimony because, at the time of the hearing, Claimant was deceased due to a self-inflicted gun shot wound on December 15, 2003.

Claimant was born on September 10, 1956. (CX-3, p. 6). At the time of his death, Claimant was 47 years old. He had an eighth grade education, but went to trade school, at Broussard's Welding School, for welding and burning and obtained a welding certificate. He also went to another welding school to brush up on heliarch welding, but could not recall the name of the school. (CX-3, pp. 10-11). At the time of his death, Claimant was no longer a certified welder because certification is only valid for six months after one stops working for a company. (CX-3, p. 13). The majority of Claimant's work history is that

of a welder.[3] Prior to his injury, he had worked on several occasions for the Employer from approximately 1996 until the time of his injury. (CX-3, pp. 14-21). He had a court-ordered child support obligation of $200.00 monthly. (CX-3, p. 26).

On April 13, 2001, Claimant was injured while welding offshore. Claimant testified that he was working aboard the rig, below the main drilling floor. Other workers were cutting beams off the roof above his work location and each time a beam was cut, the rig would shake. Claimant was on an I-beam welding. After the first time the rig shook, he was advised that he should keep working, even though he almost got knocked off the beam. (CX-3, pp. 28-31). On one of these occasions, a piece of steel plate, approximately two foot by three foot, fell from above, hitting him, knocking off his welding hood and knocking the welding lead out of his hand. The piece of steel plate fell into the water approximately 165 feet below his welding location. (CX-3, pp. 34-35). Claimant had a difficult time describing exactly which parts of his body were hit, but he knew that he was hit in the back because he discovered he was cut and bleeding. Claimant testified that the steel plate made contact with his body from his head down to his tailbone. (CX-3, pp. 30-36).

Following the incident, Claimant attempted to return to his welding, but his lead was "messed up." He reported the incident and saw the medic who put a three-inch patch on the area where he was cut. He was not aware of an accident report being filled out. At the time Claimant initially saw the medic, he believed he was okay, but "just a little sore." He continued to work in pain for approximately eleven more days. (CX-3, pp. 35-38). He eventually came in early because he "started feeling bad about being out there;" did not like the operations of the rig, primarily because he "could not get needed help;" believed they were "shorthanded;" and believed the "job was dangerous." His early departure from the rig was not because of his injury. He reported his injury to "Carlton" with Employer, but did not fill out any accident report. He did not seek medical treatment for his back. (CX-3, pp. 38-41).

About ten days later, he went back to work for Employer on a different job, but was having problems with his back, limiting his ability to stand and bend. He worked at this job for about

[3] Claimant also has work experience doing roughnecking, crane operator, fitter, tank builder, and plant maintenance. (CX-3, pp. 16-17).

ten days and then returned home. (CX-3, pp. 42-44). Upon returning from this hitch, Claimant saw Dr. James Jones for medical treatment on May 15, 2001. Dr. Jones ordered x-rays be taken of Claimant and talked with him about beginning physical therapy treatment. (CX-3, p. 44).

Claimant did not return to Dr. Jones for his back injury because Carrier sent him to Dr. Jack McNeill, an orthopedic surgeon, who prescribed physical therapy, which Claimant testified only made things worse. Claimant did not report his panic attacks or depression to Dr. McNeill. (CX-3, pp. 47-48).

Claimant did not see Dr. Jones again until April 2003, when he complained of panic attacks, depression, felt like he was at the "end of my rope," and didn't know how long he could go on. He testified he had never had panic attacks or depression prior to the date of his injury. Dr. Jones prescribed Claimant two different medications – Buspirone for pain, depression and nerves and a second medication which he could not identify. The second medication caused additional problems with sleeping and seemed to cause his mind to race 100 miles per hour. He stopped seeing Dr. Jones because he did not have money to pay for the doctor's services, but admitted that he would have continued treatment with Dr. Jones if he had the money to do so. (CX-3, pp. 45-47).

After Claimant's initial visits with Dr. McNeill, he was able to choose his own doctor, Dr. Carl Beaudry. (CX-3, p. 48). He reported problems with his back, neck, tailbone, and chest pain to Dr. Beaudry, but did not report his panic attacks or depression. Dr. Beaudry prescribed Paxil, but Claimant did not take the medication because he saw an advertisement on television about the medication and a class action and determined that the drug was too dangerous to take. (CX-3, p. 54). Claimant did not recall describing his panic attacks and depression to Dr. Ponder, an orthopedic surgeon. (CX-3, pp. 48-49).

Although he was eventually released to return to work by Drs. Beaudry, McNeill and Ponder, Claimant did not believe he should have been released. (CX-3, pp. 49). Claimant testified he was still having problems with his neck, shoulders, hip and back, mostly on his left side. He also described problems with his knees, ankles and heels, along with a balance problem because of dizziness. He further testified he thought he was having a heart attack and that his lungs were collapsing. (CX-3, pp. 50-54). He experienced "nervous problems, can't sleep,"

problems with his sinuses, sore throat, and fluid in his ears. He believed the neck, back, knees, hips, tailbone, ankle, and balance problems were all related to his injury of April 13, 2001. (CX-3, pp. 49-54).

At his deposition, Claimant continued to complain about problems in his neck, back, shoulders, hips, tailbone, knees, ankles, heels, and left wrist. He further complained of nervousness problems, inability to sleep, chest problems, dizziness, and memory loss. (CX-3, pp. 49-52).

Claimant recalled telling Dr. Ponder about finding a diagnosis for his problem on the internet, but claimed that Dr. Ponder would not let him explain. He did not recall the diagnosis. (CX-3, pp. 51-52).

Claimant attempted to work after the date of his accident. He applied for work at two different companies after his injury. He applied for work at Mundy Companies, but he failed a heliarc test and at Ingalls Shipbuilding in Pascagoula, Mississippi. Neither employer offered him a job. (CX-3, pp. 13-14, 57).

Claimant has a history of two (2) prior back injuries, a broken foot and knee injury. Claimant testified that all prior injuries have healed, except that since the on-the-job accident he has been having problems with his foot. (CX-3, pp. 60-62).

Claimant's daily activities consisted of playing guitar, watching T.V., mowing the yard using a riding lawnmower, and taking out the garbage. He also described activities which he was no longer able to tolerate because of pain, including holding down a job, walking, running, waterskiing, and swimming. He went on to testify that his activities were limited because the pain "builds up," that places in his lower back above the beltline and further up near his shoulder blades swelled with activity. (CX-3, pp. 62-66).

Around January 2003, he tried working in retail sales of blankets and after selling only three blankets, he quit because it made him too nervous and he could not handle it. He did not want to leave the house, but at other times felt like he had to get out or he would "go nuts." (CX-3, pp. 68-69).

Claimant testified that he saw psychologist Dallas Moreau on two separate occasions. (CX-3, pp. 56, 70). He was also sent to a psychiatrist by Social Security. (CX-3, p. 70). He did not know the name of the psychiatrist, nor did he know the

psychiatrist's opinion. The only other counselor he saw during his lifetime was court-ordered in connection with a DWI pending in the year 2000. (CX-3, pp. 8, 70-71).

Raymond B. Ferris

Mr. Raymond B. Ferris ("Mr. Ferris"), father of the deceased Claimant and representative of his Estate, testified on deceased's behalf. He testified that Claimant died on December 15, 2003, as a result of a self-inflicted gunshot wound. (Tr. 18). Claimant lived with his mother and father for approximately ten years and was mostly employed as an offshore welder during that period. Claimant spoke to his father shortly after being injured on April 2001. Mr. Ferris testified that Claimant told him about being hit by a falling steel plate while welding in a squatting position on April 13, 2001 and he knows of no other significant injuries suffered by Claimant before his 2001 injury. (Tr. 19-20).

Mr. Ferris testified that Claimant began seeking medical treatment from family physician, Dr. James Jones, and was subsequently seen by Dr. McNeill and then Dr. Beaudry. (Tr. 21-22). He was able to observe the effects of the pain experienced by Claimant, specifically that he would become "irritable," was "unable to sleep more than a couple of hours at a time," and was "depressed and withdrawn." Mr. Ferris observed a big change in Claimant's character. When his parents would try to talk to him about his condition, Claimant would respond "forget it" or "I don't know." (Tr. 23).

Although Mr. Ferris recognized his son was in dire need of treatment, he had limited resources because of his fixed retirement income and Claimant had no income of his own to pay for necessary treatment. Mr. Ferris insisted on paying for some treatment by arranging for Claimant to return to Dr. Jones and to see a psychologist, Dallas Moreau, because of apparent depression, withdrawal, and reluctance to mix with others. (Tr. 23-25). Mr. Ferris knew Mr. Moreau because they previously taught classes at Lamar University in Orange, Texas. He set and paid for two counseling sessions with Mr. Moreau, but Claimant would not continue the sessions because he "did not want to take the money away from his mother and father," who had been supporting him after his workers' compensation payments were suspended. (Tr. 25-27). Mr. Ferris further testified Claimant had been self-supporting, including paying child support, until his compensation was suspended. (Tr. 27).

Mr. Ferris testified regarding Claimant's two children, whom he recognized during his lifetime – a son, Michael and a daughter, Stacy. (Tr. 27-28). Stacy had actually lived with Mr. and Mrs. Ferris and Claimant for a period of about four years following the Claimant's divorce from Stacy's mother, after which she went to live with her mother. He noted that visitation continued a couple of years then Stacy slowly withdrew because of friends and other interests. Claimant told Mr. Ferris he believed the reason visitation stopped was because his daughter had stopped caring for him, which aggravated him, but did not affect his work or other activities. (Tr. 28-30). The relationship between Claimant and his daughter did not affect his relationship with his own parents. Although he was aggravated by his relationship with his daughter, he accepted the situation as being the way it was. (Tr. 27-30).

Mr. Ferris became concerned about Claimant's mental state after the accident because he had never seen Claimant in such a frame of mind or that emotional. Claimant's condition became especially noticeable after the doctors could not diagnose him with any physiological problems and he was still in pain and limited in what he could do. This "began to work on [Claimant's] mind" and because he would spend "a lot of time alone," he was very restless. He stopped playing with his band and began to stay more and more at home. He had a "music set up in the barn where he played music" and would write and record music, but he stopped all of this. He also stopped associating with any of his old long-time friends. Mr. Ferris had never observed any conduct on Claimant's part, prior to April 13, 2001, that would indicate that Claimant needed psychological counseling. (Tr. 31-32).

In the last six or eight months prior to his death, Claimant stayed at home, worked around the yard and stayed in the barn. (Tr. 32). He was unable to get a normal night's sleep, but continued to attempt at-home physical therapy, which consisted mostly of walking, recommended by Dr. Beaudry and a physical therapist, but even that was limited by Claimant's pain. Mr. Ferris noticed some "nodules" that would come up on Claimant's back above his hip following exercising or walking. (Tr. 33). Despite signs to the contrary, Mr. Ferris tried to reject the idea that Claimant was a suicide risk. (Tr. 34). Mr. Ferris further testified that Claimant loved to work and wanted to work so that he could earn money to fulfill his obligations. Claimant had attempted to return to work after his workers' compensation was suspended, but could not get hired. (Tr. 35).

Mr. Ferris went with Claimant to most of his doctor's appointments, but did not go into the examination room, except when Claimant saw Dr. Jones in April 2003. (Tr. 36). He was not aware that Dr. Beaudry had prescribed Paxil to Claimant in September 2001, noting that Claimant was extremely depressed. (Tr. 37). Mr. Ferris did not know of any traumatic event in Claimant's lifetime which had a greater impact on him than the injury of April 13, 2001.

On cross-examination, Mr. Ferris acknowledged that Claimant was diagnosed with asbestosis in early 2003. On December 15, 2003, Claimant was scheduled to give a deposition as the Plaintiff in an asbestosis lawsuit. (Tr. 38). He further affirmed Claimant had a strained relationship with his daughter, before his job accident/injury. (Tr. 39).

The Medical Evidence

Dallas J. Moreau, III

Mr. Dallas Moreau was deposed by the parties on December 10, 2003 (CX-7) and testified at the hearing. He has a Master's Degree in Clinical Psychology and has been in private practice in Orange, Texas for 22 years. (Tr. 41). He is a licensed counselor. (CX-7, p. 5). He generally works with children, families, marital issues, individuals suffering from anxiety, depression, and traumatic injury patients. He evaluated Claimant at the request of Mr. Ferris, who was very concerned about the Claimant's mental health. He knew Mr. Ferris through his past association with Lamar University in Orange, Texas, over 17 years ago. (Tr. 42-44). His report regarding Claimant has been entered into evidence as CX-8.

He first saw Claimant on March 21, 2003. This session was focused on getting to know the Claimant, obtaining background information, and an attempt to establish some kind of trust and rapport. He observed that Claimant was very forthcoming and honest, but wasn't very comfortable with being in counseling. Claimant was a very closed, very private person, not atypical for men his age and "blue collar" workers who view counseling as some sort of character fault. (Tr. 44-47).

The history taken by Mr. Moreau concerned mostly Claimant's work history and emotional history. Claimant was preoccupied with somatic, bodily complaints and fears. (CX-8, p. 1). They spoke about Claimant's life before and after the accident on

April 13, 2001. Claimant told Mr. Moreau he had completed the eighth grade and then dropped out. He had a work history of shipyard and general construction as a fitter, painter/blaster, progressing to welder. (Tr. 47-48).

Mr. Moreau and Claimant also spoke about Claimant's emotional history. Claimant presented with significant depression. Mr. Moreau testified he saw a great deal of frustration, with symptoms very consistent of depression with anxiety. Claimant also exhibited symptoms of panic attacks which resulted from his anxiety. Claimant did not know how to describe what he was feeling, but Mr. Moreau would describe it as a panic disorder with accompanying agoraphobia, "a fear of leaving your home, a fear of social places, a fear of large places . . . and that sort of thing." He was exhibiting signs of withdrawal from friends and family. Although Claimant enjoyed music, he believed his playing and writing were not as productive as before his injury. (Tr. 48-49; CX-8, p. 1).

Mr. Moreau testified he did not put Claimant through any testing during his first visit because he believed Claimant would have gotten up and "bolted out" of his office, "never to be seen again." Based on this visit, Mr. Moreau testified it was extremely obvious that Claimant was depressed and had anxiety and tremendous preoccupation with somatic complaints, which were a result of a medical condition he believed to be undiagnosed and untreated. Mr. Moreau did not have available any medical reports from any medical doctors Claimant had recently seen and, while it is part of his job to look for a connection between the physical complaints and psychological condition, he is not involved with the actual treatment of any physical ailments. (Tr. 49-52). He did not make a DSM-IV diagnosis. (CX-7, p. 11).

The second visit with Claimant took place on April 4, 2003. Mr. Moreau made some basic observations during this visit, consistent with the first visit. Claimant appeared to be very frustrated about going to different medical doctors and not finding out what was wrong with him. He was frustrated that he could not return to work because he loved being a welder. Mr. Moreau and Claimant discussed the possibility of retraining in some other occupation, capitalizing on his 28 years of experience as a welder. It was Mr. Moreau's psychological opinion that at that time, Claimant was in no way, shape or form ready to return to work. (Tr. 53; CX-8, p. 1). He believed that with support and potential retraining, Claimant might be

able to begin to work again. He testified he was trying to give Claimant something to look forward to. (Tr. 53-54).

Mr. Moreau did not obtain a detailed family history, with the exception of Claimant's two children, one being a minor. (Tr. 54).

Mr. Moreau's general diagnosis of Claimant was consistent with a fairly chronic level of depression and accompanying anxiety. He also appeared to be having panic disorders, reminiscent of agoraphobia. Mr. Moreau further testified depression has a major impact on a person and can be debilitating. Even a mild degree of depression can cause a person to lose interest in things they are most familiar with. (Tr. 55-56). One of the first signs of depression is withdrawal from significant people, resulting in social isolation. Mr. Moreau opined these things are very debilitating because it removes a person from people in the mainstream of life. (Tr. 56).

In regards to Claimant's anxiety, Mr. Moreau offered that a certain level of anxiety is normal and accepted, and so long as it stays within normal limits, it is adaptive. He stated, however, when it gets out of bounds, it is manifested by extreme discomfort, perspiration, short attention spans, and problems focusing and concentrating. Anxiety disorders are very debilitating and often go hand in hand with depression because it causes the body and the brain to run too fast, leading to some level of exhaustion, a form of depression. (Tr. 57).

Mr. Moreau testified about the difference between an anxiety disorder and a panic disorder. An anxiety disorder might be something generalized and occurs most often. On the other hand, a panic disorder is basically episodic. A true panic disorder is something not related to a particular event. A panic disorder will cause a "fight or flight" reaction where there is no stimuli, while an anxiety attack will have been precipitated by some type of stimuli. Mr. Moreau provided that probably about 25-30% of hospital emergency room admissions for suspected heart attacks are actually panic disorders. (Tr. 58-59).

Mr. Moreau opined that, due to his psychological condition, Claimant was unable to work as of March 21, 2003, certainly not in his former job. (Tr. 59).

Although Mr. Moreau believed Claimant could have benefited from medication at the time of his first visit, he did not believe Claimant was prepared or even willing to take any medication. Had Claimant been willing, Mr. Moreau would have referred him to a psychiatrist or to Dr. Jones in Orange, Texas, since Mr. Moreau is not able to prescribe medication as a psychologist. (Tr. 59-60). Mr. Moreau testified he believed Claimant would have benefited from long term treatment, but Claimant refused to come back so long as his father had to pay for the visits. (Tr. 61-62). Claimant advised Mr. Moreau that if he could obtain some type of way to pay for treatment, such as a part-time job or getting on disability, then he would come back to see him. Mr. Moreau's charges for clinical services are $95.00 per session. Mr. Moreau testified all of his testimony was based on reasonable psychological probability. (Tr. 62-64).

Mr. Moreau explained "depression" as a term commonly recognized in the medical profession by both practicing physicians and by psychologists. He receives referrals from medical doctors all the time and stated depression typically relates to a class of symptoms. A psychologist or psychiatrist will then break the depression down even further and determine whether it is chronic, acute, major, episodic, or recurring. He noted that Paxil is one of the top five medications prescribed for depression and anxiety-type symptoms. (Tr. 65-67).

Mr. Moreau was also questioned about Dr. Ponder's January 9, 2002 opinion that Claimant was manifesting marked anxiety. Mr. Moreau responded by stating that such a person would probably physically be fidgeting and sweating and that their concentration level and short term memory would likely be impaired. They would also be talking too much, saying nonsensical things. (Tr. 67).

When asked about Dr. McNeill's comment that Claimant was psychologically incapable of doing any kind of work on December 9, 2003, Mr. Moreau completely agreed, stating it was also true during his visits with Claimant in March and April 2003. (Tr. 68).

Mr. Moreau opined that Claimant's death on December 15, 2003, was an "ultimate confirmation of his diagnosis of depression." Although Mr. Moreau could not state precisely when Claimant's inability to work due to his psychological condition started, it was clear to him that it did not start on the date of his first visit, but it had been going on for quite some time since shortly after the accident had occurred in 2001. (Tr. 69-

70). He further explained, while major depressive episodes can occur in a very short period of time, they are typically experienced over a lifetime. (Tr. 70). He then clarified that in Claimant's case, there was no evidence whatsoever of a major depressive episode in the past and that his depression appeared to be progressive in nature. A major depressive episode is not necessarily connected to a particular event and can occur spontaneously. Mr. Moreau provided that depression is generally believed to be caused by neurotransmitter substances in the brain known as the serotonin group becoming dysfunctional, causing the brain to continue to work, but in a slow, sluggish depressed fashion. (Tr. 71-72).

Mr. Moreau also testified that the suspension of Claimant's workers' compensation benefits in November 2001 would have had a devastating impact on him because he was proud to be self-sufficient. Mr. Moreau obtained no information suggesting anything other than the on-the-job injury in April 2001 caused or led to the condition he diagnosed. (Tr. 72-73).

On cross-examination, Mr. Moreau admitted that additional historical information concerning Claimant's relationship with his daughter, his divorces, asbestosis, and his other legal claims could have changed his impression as to the cause of the Claimant's mental condition. (Tr. 73-78).

On re-direct examination, however, he was clearly of the opinion that the accident and aftermath was the total focus of Claimant's debilitating mental condition. He reasoned that Claimant had every opportunity to discuss those other matters and clearly his chief focus and source of stress was regarding the fact that he had been injured on the job, could not work and was very frustrated because of the inability to find out what was physically wrong with him "so he could get better . . . and go back to work." (Tr. 79-80).

James Jones, M.D.

The parties deposed Dr. James Jones, a board-certified family practice physician, on December 10, 2003. (EX-6). His medical records were introduced into evidence as CX-6 and EX-4. Dr. Jones has been practicing in Orange, Texas, for 34 years. (EX-6, p. 4).

Dr. Jones was Claimant's family doctor and had treated him prior to his April 15, 2001 job injury. He did not recall treating him for any prior back problems. He first saw Claimant

after his injury on May 15, 2001. (EX-6, p. 5; CX-6, pp. 6-14). Claimant reported to Dr. Jones that he was injured while welding, when he was struck by a large piece of iron. An examination revealed a small, triangular shaped scar over his left iliac area. Claimant had full range of motion in his back, but some tenderness with extremes of motion in all areas and some tenderness to palpation in the right lumbar, lumbosacral and upper back areas. His neurological exam and lumbar and thoracic x-rays were normal. (EX-6, pp. 5-6; CX-6, p. 7). Dr. Jones did not see Claimant again until April 2003 because Ms. Cook, Carrier's adjuster, advised that Claimant was going to be followed-up by Dr. McNeill, an orthopedist. (EX-6, p. 5).

About two years later, on April 8, 2003, Dr. Jones saw Claimant for a second time. (CX-6, p. 5). Claimant advised Dr. Jones that he continued to experience back pain and had seen several doctors since their last visit, but the doctors did not find anything wrong with him. Claimant complained to him about having panic attacks and chronic back and neck pain. Examination revealed that Claimant lost his balance upon closing his eyes. Dr. Jones opined that in view of the balance problem, ongoing panic attacks and back pain, Claimant was unable to work, due to a soft tissue injury of the back. Dr. Jones could not state whether these problems related to the April 2001 injury, but stated Claimant believed that to be the cause. (EX-6, pp. 6-8). He opined that further evaluation by an orthopedist and neurologist was indicated. Id.

Dr. Jones saw Claimant two more times prior to Claimant's death. He saw him on April 14 and 30, 2003, when he had lab work done on Claimant. The lab work indicated that Claimant had a little increase in his lipids and his balance problem was still present. (EX-6, p. 8; CX-6, pp. 1-4). Dr. Jones changed the medication previously prescribed for panic attacks, because Claimant advised that they made him irritable. There is no record indication when the panic attack medication was first prescribed. Dr. Jones testified at the time of the visit, continued treatment with Dr. Beaudry, an orthopedist, would have been appropriate. (EX-6, pp. 8-10).

On cross-examination, Dr. Jones testified he first saw Claimant in 1976 and treated him regularly for the next six years. Based on his personal relationship and knowledge of Claimant's history, Dr. Jones further testified that when he saw Claimant in 2001 he was having panic attacks and would have benefited from receiving psychological counseling, but Dr. Jones's feeling was that the first step should be that Claimant

see an orthopedist. While Dr. Jones received Claimant's reports of pain and observed symptoms of psychological problems, he was not in a position to state whether the cause of such problems were the result of his on-the-job injury. He did, however, testify Claimant's injury from the steel plate could have been the cause of continued back complaints since April 2001. Dr. Jones opined the panic attacks were the result of post-traumatic stress-disorder. (EX-6, pp. 11-14).

Dr. Jones is familiar with Dallas Moreau, a clinical psychologist, but was not aware he had evaluated Claimant on two separate occasions. Dr. Jones felt Mr. Moreau had the qualifications and was in the best position to provide counseling to Claimant. (EX-6, p. 14).

Dr. Jones made a notation in his notes of May 15, 2001, after Claimant advised him that he was hit by a steel plate, of a small abrasion on the lateral aspect of the left iliac area, and that Claimant had a little contusion in the infrascapular area, below the shoulder blade. (EX-6, p. 15; CX-6, p. 7).

Between 1995 and 1998, Dr. Jones had seen Claimant about 15 times and had not noticed any psychological problems. Since the accident he has seen a change in Claimant's personality, now observing symptoms of panic attacks. Dr. Jones described a panic attack as an extreme form of anxiety, often associated with feelings of impending doom, sweating, shortness of breath, chest pain, very, very scared and feelings of impending death. He believed in Claimant's case it would be in the category of post-traumatic stress disorder. As a result, Dr. Jones noted that Claimant on April 8, 2003, remained unemployable due to a combination of physiological and psychological reasons. Effexor and Buspar were prescribed for the panic attacks, but Claimant discontinued taking the medications because he believed they were making his symptoms worse. (EX-6, pp. 15-18).

Dr. Jones opined that uncontrolled acute anxiety or panic attacks can be disabling and prevent a person from engaging in useful, gainful regular employment. (EX-6, p. 18).

Although Dr. Jones could not state with medical certainty that the panic attacks were caused by the 2001 injury, he stated that it was possible and it was his subjective feeling that it was more likely than not that they were. (EX-6, pp. 18-19). To the extent Drs. Ponder, Beaudry, and McNeill released Claimant to return to work, Dr. Jones would defer to their opinions. (EX-6, p. 19).

Carl Beaudry, M.D.

Dr. Carl Beaudry's deposition was taken on January 27, 2004 and was introduced into evidence as CX-9. His medical records were introduced into evidence as CX-11 and EX-3. Dr. Beaudry is a board-certified orthopedic surgeon and has been in a solo practice since 1978. (CX-9, p. 6).

Dr. Beaudry first examined Claimant on July 6, 2001, when he complained of pain over his cervical, dorsal, and lumbosacral spine. Dr. Beaudry found Claimant temporarily totally disabled since May 10, 2001, until further notice. (CX-11, p. 45). Claimant related to Dr. Beaudry that he had last been well on April 13, 2001, when while working offshore and welding, he had a large steel plate fall onto his neck, dorsal, and lumbar spine. He further advised Dr. Beaudry that he continued working for several days after his accident and then returned home, still experiencing pain over his spine. He subsequently returned to work for a few days, but was unable to continue working because of ongoing pain. Claimant also gave Dr. Beaudry his treatment history with Dr. James Jones and Dr. Jack McNeill, who treated Claimant conservatively with medication and physiotherapy. When asked why he did not continue treatment with Dr. McNeill, Claimant responded "he felt he was getting the go-around." (CX-9, pp. 8-9; CX-11, pp. 42-44).

Dr. Beaudry ordered MRIs of the dorsal and lumbar spine, which were the most symptomatic areas at the time. The MRIs were within normal limits except for the incidental finding of a small hemangioma in the vertebral body of L5, not believed to be a result of the April 2001 injury. (CX-9, p. 10; CX-11, pp. 38-40). Dr. Beaudry interchanged Claimant's anti-spasmodic, anti-inflammatory and analgesic medications and prescribed a program of intensive physiotherapy. (CX-11, p. 44).

Dr. Beaudry testified that on September, 6, 2001, Claimant appeared to be extremely depressed and prescribed an anti-depressant, Paxil. Dr. Beaudry also suggested Claimant might benefit from epidural steroid injections to block the pain cycle and decrease the swelling and inflammation in and around the nerve roots and the spinal sac. (CX-9, p. 11; CX-11, p. 37). Claimant indicated he would think about the injections, but when he later decided to have the injections, he was advised that the procedure had been denied by the adjuster and pre-certification could not be obtained for either epidural injections or a bone scan. (CX-9, pp. 12-13). Dr. Beaudry testified that he

recommended epidural injections because Claimant had lower back pain with sciatica discomfort in his lower extremities, secondary to nerve root irritation. Claimant also exhibited objective findings of limited back motion and spasm in his lower back. (CX-9, pp. 16-17). In October 2001, Dr. Beaudry advised Carrier that he could not provide a date of maximum medical improvement since Claimant had not been given the full benefit of treatment. (CX-9, p. 18).

Dr. Beaudry opined Dr. McNeill's assessment of September 18, 2001, that Claimant had reached maximum medical improvement was an incorrect assessment since he was providing ongoing treatment to Claimant and trying to obtain more tests and therapeutic procedures. He further opined the percentage of disability assigned by Dr. McNeill made no sense. (CX-9, pp. 14-15, 19). Dr. Beaudry testified that on October 16, 2001, Claimant was temporarily totally disabled from returning to his regular duties. (CX-9, p. 15). Dr. Beaudry also testified that the comment made by Dr. McNeill in his last report that Claimant was psychologically incapable of doing any work at that time is a rare and unusual opinion to be offered by an orthopedic surgeon. Dr. Beaudry explained, however, that a person's psychological injuries certainly affect their physiological recovery from injury. (CX-9, pp. 30-31).

Although the bone scan was initially denied, Dr. Beaudry later received permission to perform the scan in November 2001. The bone scan was negative with regard to the spine, but showed increased activity around Claimant's right shoulder and wrist, which may have been caused by the accident. Dr. Beaudry could not state definitively whether or not the increased activity was caused by the 2001 accident. Dr. Beaudry also requested authorization for pain management, but Carrier denied certification. (CX-9, pp. 19-22; CX-11, pp. 28-34).

Dr. Beaudry's last examination of Claimant was on April 18, 2002. In his report dated April 26, 2002, Dr. Beaudry reported some improvement in the severity of Claimant's pain and an attempt to return to work was discussed. Dr. Beaudry opined that Claimant was not yet at maximum medical improvement as of April 18, 2002. (CX-9, pp. 22-23; CX-11, p. 23). The attempt to return to work was initiated by Claimant in a telephone call with Dr. Beaudry's office on April 15, 2002. Dr. Beaudry did not believe Claimant was capable of returning to work as a welder, and believed Claimant's desire to return to work was triggered by the fact that his workers' compensation payments had been suspended. It was also discussed that if Claimant was

unable to perform his duties, he would return to Dr. Beaudry for further treatment. Dr. Beaudry believed, if anything, a return to work would help Claimant psychologically. (CX-9, pp. 22-28).

Dr. Beaudry testified the appearance of a knot alongside the spine on increased activity would be consistent with a soft tissue injury, such as a chronic sprain involving muscles and ligaments, in and around the spine, a condition not seen on X-rays, MRIs or bone scans and would probably represent a muscle spasm. (CX-9, p. 29).

On cross-examination, Dr. Beaudry stated, while he had not referred Claimant to a psychologist or psychiatrist, he had attempted to set up a pain management program with a clinic utilizing a multi-disciplinary approach that often involves psychological or psychiatric counseling. Had he believed Claimant presented a danger to himself or others, he would have referred him to the appropriate professional. (CX-9, pp. 32-34).

Finally, Dr. Beaudry testified he believed there was a five month gap in treatment from December 2001 to April 2002, because Dr. Beaudry could not get anything authorized by Carrier and Claimant became discouraged and just quit coming. (CX-9, pp. 35-36).

R. Craig Ponder, M.D.

The deposition of Dr. Craig Ponder, a board-certified orthopedic surgeon, was taken on December 9, 2003, and was admitted into evidence as EX-5. His medical records were introduced into evidence as EX-1.

Dr. Ponder examined Claimant at the request of the U. S. Department of Labor on January 9, 2002. (EX-5, p. 5; EX-1, pp. 2-3). He reviewed all of Claimant's available medical records and obtained a history of Claimant's job injury. On physical examination, Dr. Ponder noticed a healed abraded area over Claimant's left ilium. Claimant complained of pain in his lower back during a forward bend, nevertheless there was no more distal radiation into his lower extremities. (EX-5, pp. 5-7; EX-1, pp. 4-6). Muscle and reflex functions were within the normal range. Dr. Ponder diagnosed a contusion and a healed abrasion in and about the lumbar spine. He noted no other physical aberrations or abnormalities. Dr. Ponder opined that Claimant was fortunate his injury was not more grievous, and that he would expect Claimant to be able to return to doing

anything, including welding, and any back problems after January 9, 2002, would not be related to his on-the-job injury of April 13, 2001. (EX-5, pp. 7-9; EX-1, pp. 4-6).

On cross-examination, Dr. Ponder clarified his opinion that any complaints after January 9, 2002, would be the result of physiologic deterioration and normal aging, not Claimant's 2001 injury. Dr. Ponder further opined any complaints of pain Claimant experienced, since the date of his injury, were the result of his subjective rendition because no physician found any physical change, objective change or abnormality to support or explain those subjective complaints. (EX-5, pp. 9-13; EX-1, pp. 4-6). Dr. Ponder stated he was a physician and was not called upon to rule upon the validity of the patient's expressed complaints of pain, but after appropriate testing, he would report no subjective or physical change to explain the complaints of pain. (EX-5, pp. 13).

Dr. Ponder further testified Claimant was absolutely convinced there was some aberration in and about his spine and his body as a consequence of his April 2001 injury that just simply had not yet been discovered or outlined. As a result of Claimant's behavior, Dr. Ponder opined Claimant was manifesting marked anxiety. He explained, whatever Claimant perceived or conceived happened to him was essentially producing a dysfunctional patient. (EX-5, pp. 13-15). He went on to state, since there was no physical change and if an incapacity dysfunction was still being clinically presented, Claimant would have benefited from counseling by a counselor or a psychotherapist. Dr. Ponder noted that some patients benefit greatly, including resolution of pain, from counseling. Although Dr. Ponder had not seen Claimant in over two years, he believed psychological treatment would have been an option to consider. (EX-5, pp. 15-16).

Jack McNeill, M.D.

The deposition of Dr. Jack McNeill, Employer/Carrier's examining physician, was taken on February 18, 2004 and introduced as EX-8. His medical records have been introduced as EX-2. Dr. Jack McNeill is a board-certified orthopedic surgeon who has been practicing medicine since 1959 and orthopedic surgery since 1964. He has occasionally seen patients who had psychological problems and made referrals to psychologists, psychiatrists or counselors. (EX-8, pp. 4-5).

Dr. McNeill first saw Claimant on May 24, 2001 at which time Claimant complained of pain in his upper back and numbness of his left leg. Claimant gave a history of being struck in the back by a large, metal plate that fell in an accident at work on April 13, 2001. A physical examination revealed a moderate lumbar lordosis, pain in the mid-thoracic region, but without tenderness or tightness, and all other tests appearing normal. Dr. McNeill believed Claimant had sustained a contusion (a deep bruise) and a strain of his back. Dr. McNeill prescribed anti-inflammatory medicine, muscle relaxants, and physical therapy. (EX-8, pp. 6-7).

Claimant's next visit with Dr. McNeill was on June 14, 2001. Claimant complained that his back was worse and he was feeling pain from his neck to his tailbone. Claimant advised Dr. McNeill some of the exercises from physical therapy seemed to increase his pain, while others seemed to help. On physical examination, Dr. McNeill noticed tenderness in the mid and lower lumbar area, decreased range of motion, and complaints of lower back pain and numbness of both legs. Although Dr. McNeill did not change his diagnosis, he changed Claimant's medication and ordered an MRI, but Claimant did not return to have the MRI performed. (EX-8, pp. 7-8).

Dr. McNeill next saw Claimant on September 18, 2001, again at the request of the Carrier. (EX-8, pp. 8-9). Claimant again complained of pain in the right side of his lower back and occasional shooting pain down his right leg. Claimant also complained of spasms in his back, especially when he walks, so he just "stays off his feet." Claimant complained of depression since he could not go back to work. He reported that Dr. Beaudry had prescribed Paxil to help with his depression, but Claimant heard on TV that the drug was dangerous and decided not to take it. No other anti-depressants were prescribed by Dr. McNeill. Claimant denied any new injuries. (EX-8, p. 9).

During his September 18, 2001 visit, Dr. McNeill maintained his diagnosis of a contusion and strain to the upper back. After reviewing MRIs taken on August 15, 2001, Dr. McNeill reported everything was normal, with the exception of a small hemangioma, a little blood vessel tumor, which does not cause pain. Dr. McNeill assessed Claimant at maximum medical improvement with a four percent impairment to the whole person. He found no objective findings to justify any further treatment, releasing Claimant for work as an oilfield fitter, welder. (EX-8, pp. 9-10).

Dr. McNeill's last visit with Claimant was on December 9, 2003. As with every other visit, Dr. McNeill took Claimant's history, noting Claimant had not returned to work since the 2001 injury. Dr. McNeill noted that Claimant had seen, since their last visit, Dr. Jones especially for his nerves and that Dr. Ponder advised him that he should go back to work. Claimant denied any new injury. He complained of frequent headaches, hurting from head to toe, neck pain, back pain, hip pain, occasional stomach problems and nerve problems since the 2001 injury. Physical examination revealed no tenderness, tightness or limited range of motion. (EX-8, pp. 10-11).

As a result of his physical examination, in which testing appeared normal, Dr. McNeill testified there was no physical reason why Claimant could not have returned to work after September 2001. Dr. McNeill further opined Claimant's psychological state was drastically different and he was psychologically unable to work in December 2003. Dr. McNeill specifically noted Claimant seemed very nervous and agitated, and had he been treating Claimant, he would have referred him for psychological treatment. Dr. McNeill noted there was a noticeable psychological difference in Claimant since the last time he saw him in September 2001, but acknowledged he was not a psychologist or psychiatrist. (EX-8, pp. 12-14).

Dr. McNeill testified that Claimant's physical complaints were disproportionate to physical findings. (EX-8, p. 15). He stated he would very rarely write a letter stating someone could not work psychologically, because as an orthopedic surgeon, workers' compensation would not pay any attention to an orthopedist talking about psychological problems nor would they pay for any psychological evaluation. Dr. McNeill does not prescribe mood elevators or mood altering drugs because workers' compensation insurance companies do not pay for mental problems, only physical, and a patient would have to go see someone else, such as their family doctor, for any psychological treatment or evaluation. Dr. McNeill noticed a marked psychological difference in Claimant between 2001 and 2003. (EX-8, pp. 15-17).

On cross-examination, Dr. McNeill stated he was advised by counsel for Employer and Carrier that Claimant died of a self-inflicted gunshot wound on December 15, 2003. Dr. McNeill opined Claimant's psychological disability was confirmed by the events of December 15, 2003. (EX-8, pp. 18-19).

Although Dr. McNeill could state with certainty Claimant was disabled as December 9, 2003, he could not state with medical certainty when Claimant's psychological disability began. (EX-8, pp. 19-20). He testified that observations regarding depression and psychological problems usually come about from a relationship built up with the patient and the ability to see the psychological problems often depend on a long-term relationship with the individual being treated. The longer the relationship, the more likely one notices changes. He also testified, when he saw Claimant in December 2003, there was not just a subtle change in his personality, it was a drastic change that was readily observable. (EX-8, pp. 20-21).

Although Dr. McNeill could not state with medical certainty that Claimant's mental condition was the result of the April 2001 injury, he opined it was possible the injury and subsequent physical problems could have led to the psychological condition. (EX-8, pp. 21-23).

Dr. McNeill noted when Claimant was originally referred to him by Carrier, his instructions were to evaluate and take only basic plain film x-rays. (EX-8, pp. 23-24). He explained that the controls imposed by workers' compensation insurance companies make it extremely difficult to ever get approval for any recommendations concerning psychological counseling, and that he often has to advise his patients to seek further treatment from their family physician, because psychological issues cannot be handled under the work injury. (EX-8, p. 25).

Dr. McNeill further explained that one of the problems he has treating chronic pain is it does not always show up on x-rays, MRIs, CAT scans or other diagnostic tools available. He agreed that pain management and physical therapy, in the absence of objective findings, would be appropriate modalities of treatment. (EX-8, p. 26).

He reviewed Mr. Moreau's psychological report on Claimant which was provided to Dr. McNeill prior to his December 9, 2003 examination. He opined Mr. Moreau's report and observations were consistent with what he observed in Claimant. (EX-8, pp. 27-28).

According to Dr. McNeill, muscle spasms are objective evidence of the existence of pain. Muscle spasms can sometimes be seen, but one always needs to feel for it. It happens when the muscle is contracted very tight and it will pump up or jump up. Dr. McNeill compared it to the child's game of hitting

someone on the top of a muscle, causing a "frog to jump up," as a form of a muscle spasm which can be observed. (EX-8, pp. 29-30).

Dr. McNeill testified that while he has never recommended an epidural block to patients who lacked objective findings on testing, he is aware of people who have had a trial with epidural when nothing can be found but subjective complaints of pain. He further noted pain can be disabling and depression can occur when a patient has endured chronic, long lasting pain, with no real resolution of the underlying problems. (EX-8, pp. 31-33).

He was not aware of Claimant's attempts to return to work, but indicated Claimant's desire to return to work helps a treating physician in trying to get someone back to work. (EX-8, p. 33).

When asked about Dr. Ponder's opinion that Claimant was exhibiting or manifesting marked anxiety on January 9, 2002, Dr. Beaudry's report that Claimant was extremely depressed on August 23, 2001, and Dr. Jones's report in April 2003 of Claimant's panic attacks and anxiety, Dr. McNeill opined that it was clear Claimant became totally disabled from working, regardless of the cause. (EX-8, pp. 33-36).

Dr. McNeill could not state however, whether or not the psychological problems could have been caused by the on-the-job injury of April 2001. He initially testified that he did not believe the psychological condition observed in Claimant on December 9, 2003, was an "appropriate" reaction to the minor on-the-job injury Claimant received, but then clarified his testimony to state Claimant's reactions were more "unexpected" then inappropriate. (EX-8, pp. 36-38).

The Contentions of the Parties

Claimant contends he sustained a physical injury in April 2001 which resulted in a psychologically disabling condition and prevented him from returning to work. Claimant further contends he established credible evidence that he remained both physically and psychologically disabled from working at all times up until the date of his death. Therefore, he seeks continued compensation from November 23, 2001 until the date of his death on December 15, 2003. He also seeks reimbursement of out-of-pocket medical expenses in the amount of $778.04 (CX-14), plus interest therein.

Claimant argues that even though there were no physical objective findings, he continued to experience severe back pain which prevented him from returning to work. Claimant further contends that his physical disability resulted in a psychological impairment which also prevented him from engaging in substantial gainful activity. Claimant contends he was entitled to continued compensation benefits from November 23, 2001 until December 15, 2003 due to both a physical and psychological disability.

Employer/Carrier, on the other hand, argue that Claimant's physical condition was resolved within months of his on-the-job injury. They further claim Claimant failed to present sufficient evidence to support his contention that his psychological condition was related to his on-the-job injury. Employer/Carrier also contend Claimant failed to prove his psychological condition was caused by the injury. They argue Claimant was not entitled to a continuing presumption once he was released to return to work. Employer/Carrier maintain Claimant's request for compensation benefits, reimbursement of medical expenses, and attorney's fees should be denied.

Alternatively, Employer/Carrier request that if this Court finds benefits are due, benefits should only be awarded from the date Dal Moreau opined Claimant was disabled, April 7, 2003, until the date of Claimant's death.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or

theory of any particular medical examiner. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical [or psychological] harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

It is well-settled that a psychological impairment can be an injury under the Act if it is work-related. Lazarus v. Chevron, USA, 958 F.2d 1297, 1299 (5th Cir. 1992); Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base, 32 BRBS 127, 129 (1997); Konno v. Young Brothers, Ltd., 28 BRBS 57, 61 (1994). Psychological impairments have included depression due to a work-related disability, Hargrove v. Strachan Shipping Co., 32 BRBS 11, 15 (1998); anxiety conditions, Moss v. Norfolk

Shipbuilding & Dry Dock Corp., 10 BRBS 428 (1979); headaches, Sanders v. Alabama Dry Dock & Shipbuilding Co., 22 BRBS 340, 341-42 (1989); and stress. Marinelli v. American Stevedoring, Ltd., 34 BRBS 112, 117 (2000), aff'd 248 F.3d 54 (2nd Cir. 2001). Where a work-related accident has psychological repercussions it is also compensable. Tampa Ship Repair & Dry Dock v. Director, OWCP, 535 F.2d 936, 938 (5th Cir. 1976).

1. Claimant's Prima Facie Case of Causation

a. Physical Condition

The parties have stipulated that Claimant was injured in the course and scope of his employment on April 13, 2001. (JX-1). Therefore, Claimant's physical injury constituted a compensable injury for which Employer/Carrier was responsible.

b. Psychological Condition

It is beyond question that Claimant's psychological condition ultimately led to his death by a self-inflicted gunshot wound on December 15, 2003. There is a dispute, however, as to whether Claimant's psychological condition was caused by his physical injury of April 13, 2001.

Mr. Ferris testified that after Claimant's job injury he became irritable, was unable to sleep and appeared depressed and withdrawn. He observed a "big change in Claimant's character." Before his job accident/injury, he had never seen his son in such a frame of mind "or that emotional." He noticed Claimant's condition worsened after the doctors could not diagnose Claimant with any physical problems despite continued pain complaints. His situation began to "work on Claimant's mind," he spent a lot of time alone and was very restless.

Mr. Moreau's initial impression of Claimant on March 21, 2003, was that he presented with significant depression. He observed a great deal of frustration on Claimant's part going to different doctors and not finding out what was wrong with him from his job accident/injury. Claimant was also frustrated that he could not return to work. Claimant's symptoms were consistent with depression and anxiety. Claimant also had symptoms of panic attacks. Mr. Moreau described the panic disorder as agoraphobia with signs of withdrawal. Claimant had a tremendous preoccupation with somatic complaints, resulting from his medical condition which he believed had been undiagnosed and untreated by the physicians he had seen.

Mr. Moreau diagnosed Claimant with a chronic level of depression and accompanying anxiety and panic disorders, reminiscent of agoraphgobia. He opined, within psychological certainty, that Claimant was unable to work as of March 21, 2003. He opined that he was unaware of any evidence of a major depressive episode in Claimant's past and that his depression appeared to be progressive in nature. The suspension of Claimant's workers' compensation benefits in November 2001 would have had a devastating impact on Claimant. He obtained no information or evidence suggesting anything other than the job injury in April 2001 caused or led to Claimant's psychological condition.

Mr. Moreau's conclusion that Claimant's debilitating psychological condition is related to his job accident and injury is buttressed by Claimant's total focus on his job accident and its aftermath.

Although Mr. Moreau admitted that he did not obtain a detailed history from Claimant, he opined that Claimant's psychological condition emanated from the April 2001 injury and its aftermath regarding medical treatment. Mr. Moreau explained that regardless of what else was going on in Claimant's life, Claimant was focused solely on his April 2001 injury when discussing his psychological problems. Based on Mr. Moreau's psychological opinion, I find and conclude that Claimant established a **prima facie** case that his psychological injury was, at least in part, related to his work accident/injury sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical and/or psychological harm or pain and the working conditions which could have cause them.

The burden then shifts to the employer, to rebut the presumption, with substantial, specific and comprehensive evidence to the contrary that Claimant's condition was not caused or aggravated by his employment. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

Accordingly, Employer must produce substantial evidence that Claimant's conditions were neither, caused by the working conditions, nor aggravated, accelerated or rendered symptomatic by such conditions. Id. "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer/Carrier argue that Claimant's relationship with his daughter, his diagnosis of asbestosis and other pending

lawsuits were the cause of Claimant's depression. The record reveals that Claimant's relationship with his daughter and his reduced visits with her began before his job injury in that Mr. Ferris indicated the change in relationship had not affected Claimant's work or other activities. Although Claimant was diagnosed with asbestosis in early 2003, the record is devoid of any symptomatology or psychological affects such a diagnosis may have had on Claimant. To conclude otherwise would be mere speculation.

Employer/Carrier also contend that since Claimant sought no treatment for his psychological problems from the date of his job injury in April 2001 until March 2003, the condition is not work-related. A review of the medical evidence of record discloses that there are no specific medical opinions that Claimant's psychological condition was or was not related to his job injury of April 2001.

Dr. Jones observed panic attacks in Claimant when he examined him in April 2003, but not during treatment in 2001. He could not state whether such attacks were related to Claimant's work accident/injury, but noted that Claimant thought they were related. However, he opined that Claimant's panic attacks were the result of post-traumatic stress disorder, which supports Mr. Moreau's conclusion that the job accident/injury created a residual psychological component to Claimant's injury. He further opined, although not to medical certainty, that it was possible and more than likely that Claimant's panic attacks were caused by his 2001 job injury.

Dr. Beaudry found Claimant extremely depressed in September 2001, well before his diagnosis of asbestosis, but rendered no opinion that the depression was caused by the traumatic injury of April 2001.

In January 2002, Dr. Ponder observed Claimant to be manifesting a marked anxiety and opined that whatever Claimant perceived or conceived happened to him was essentially producing a dysfunctional patient. His observation arguably related to Claimant's job injury and its sequelae. He rendered no other causative opinions.

Dr. McNeill acknowledged that he observed a drastic difference in Claimant psychologically from September 2001 and December 2003 and that Claimant was considered psychologically disabled in December 2003, which was confirmed by his subsequent suicide on December 15, 2003. However, Dr. McNeill could not

state with medical certainty when Claimant's psychological disability began or its origin or nexus to the April 2001 job accident/injury, but opined that it was possible Claimant's job injury and subsequent physical problems could have led to his psychological condition.

Thus, the foregoing fails to establish that Employer/Carrier rebutted the presumption of Section 20(a). In fact, there is essentially more corroboration of a finding of causation than rebuttal. Therefore, I find and conclude that Claimant suffered from a psychological injury in the form of depression with anxiety and panic attacks attributable **in part** to his work-related accident/injury for which Employer/Carrier are responsible.

B. Nature and Extent of Disability

Having found that Claimant suffered from a compensable physical and psychological injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director,

OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for

purposes of explication.

The parties do not dispute that Claimant suffered a work-related injury on April 13, 2001. In fact, Claimant received compensation benefits from May 24, 2001 until November 22, 2001. (JX-1). The pivotal issue presented is whether Claimant continued to be disabled from November 23, 2001 until the date of his death, December 15, 2003.

Prefatorily, it is noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physician rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an Administrative Law Judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980) ("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378, 393 (5th Cir. 2000) (in a Social Security matter, the Court noted that a treating physician's medically supported opinion as to the existence of a disability is binding on the fact-finder unless contradicted by substantial evidence to the contrary).

Having considered the totality of the evidence of record, I find and conclude that Claimant remained physically temporarily totally disabled after November 22, 2001, consistent with the opinion of Dr. Beaudry, his treating physician, who recommended epidural steroid injections and pain management as a regime of continued ongoing treatment and sought additional testing and therapeutic procedures, which were denied by Employer/Carrier. I find Dr. Beaudry's medical opinions to be more persuasive, well-reasoned and supported by the record.

Dr. Beaudry opined that epidural steroid injections would benefit Claimant by blocking his pain cycle and decreasing the swelling and inflammation in and around the nerve roots and the spinal sac. The epidural injections were recommended because it was Dr. Beaudry's opinion that Claimant had lower back pain with sciatica discomfort in his lower extremities, secondary to nerve root irritation. Moreover, he noted that Claimant exhibited objective findings of limited back motion and spasm in his lower back in September 2001. He refused to assess Claimant at

maximum medical improvement in September or October 2001 because Claimant had not been given the full benefit of medical treatment as recommended.

I agree with Dr. Beaudry that Dr. McNeill's opinion that Claimant had reached maximum medical improvement on September 18, 2001, is inappropriate and unreasonable since Claimant was being actively treated with recommended procedures pending before Carrier which were subsequently denied. Dr. McNeill's opinion is at best unreasoned and was not further explicated. His assessment of a four percent permanent impairment rating is also unreasonable and not further explained by Dr. McNeill. An impairment rating was not assessed for Claimant's lower back motion which was regarded as invalid.

Dr. Beaudry continued Claimant on temporary total disability in October 2001 opining that he could not return to his former duties. Although he agreed to release Claimant for a work attempt in April 2002, he believed Claimant sought to return to work because Employer/Carrier had suspended his compensation benefits. As of April 18, 2002, Dr. Beaudry maintained his opinion that Claimant was not capable of returning to his former job as a welder and was not yet at maximum medical improvement.

Dr. Beaudry observed that pain management to which he sought to refer Claimant is a multi-disciplinary approach which involved treatment for physical and psychological problems. Claimant was not authorized to seek such pain management because of Employer/Carrier's denial of certification.

In April 2003, Dr. Jones opined that Claimant's continued complaints of back pain and his psychological condition caused him to be unemployable as of April 8, 2003. As noted above, he opined that the psychological condition was more likely than not caused by the residuals of Claimant's 2001 job injury.

Notwithstanding the foregoing, Employer/Carrier suggest that Claimant continued to work after his injury and Drs. McNeill, Ponder and Beaudry released Claimant to return to work by November 22, 2001. Employer/Carrier argue that no objective findings were noted by November 22, 2001, and therefore they suspended future compensation benefits to Claimant. Thus, Employer/Carrier aver that Claimant had no residual physical injury or disability which would justify continuing compensation benefits after November 22, 2001. Employer/Carrier also argue

that Claimant reached maximum medical improvement and could return to work as of November 23, 2001.

Only Drs. McNeill and Ponder released Claimant to return to his former job. I accord less weight to their opinions as consultative physicians who did not treat Claimant. Dr. Beaudry opined that Claimant could not perform his former job and had not yet reached maximum medical improvement. Employer's job description provides evidence of specific physical demands required of Claimant in his offshore welding position. Welders should be in excellent physical condition because greater demands are placed on individuals working in this area. Since Claimant testified that walking and performing recommended at-home physical exercises caused him significant pain, it is clear he was not able to return to work as an offshore welder, which comports with Dr. Beaudry's medical opinion. I find, given Dr. Beaudry's opinion, Claimant could not have sustained employment as a welder in his former job.

Dr. Ponder, who examined Claimant on one occasion, rendered an opinion on behalf of DOL in January 2002 that Claimant exhibited no objective findings. He concluded, inexplicably, that any future back problems would not be related to Claimant's job injury. Dr. Ponder rendered no opinion about Dr. Beaudry's objective findings or his recommended epidural injections or pain management modalities for Claimant. He agreed that counseling could benefit an individual even with resolution of pain and believed psychological treatment would have been an option for Claimant if he presented with an incapacity dysfunction.

Dr. McNeill evaluated Claimant on four occasions. The first three examinations occurred from May 2001 to September 2001. His findings revealed tenderness, decreased range of motion, numbness in the legs and reports of spasm for which medication was prescribed. He found Claimant at maximum medical improvement on September 18, 2001 and assigned a four percent permanent impairment because of a lack of objective findings to justify further treatment.

Dr. McNeill offered no opinions regarding Dr. Beaudry's ongoing medical treatment during the same period of time, nor is the record clear that he was provided or reviewed Dr. Beaudry's treatment records. However, consistent with the opinions and recommendations of Dr. Beaudry, he agreed that, even in the absence of objective findings, pain management and physical therapy would be appropriate modalities of treatment. He also

acknowledged that he is aware of individuals who lacked objective findings undergoing epidural steroid injections when only subjective complaints of pain exist. He further confirmed that pain can be disabling and depression can occur when a patient has endured chronic, long lasting pain.

Dr. McNeill's December 2003 evaluation of Claimant confirmed Mr. Moreau's opinion that Claimant was suffering from a psychological impairment and disability and unable to work at that time.

Although Dr. Ponder opined that Claimant exhibited marked anxiety in January 2002, there is no evidence to support a finding Claimant suffered from a severe psychological impairment which would have prevented him from working. There is evidence to support a finding that Claimant's psychological impairment worsened between his April 2001 injury and March 2003, the date he first saw Dr. Moreau. Dr. Moreau's psychological opinion, as explained above, supports a finding of causation and disability.

Claimant contends that after November 2001 he remained disabled due to both physical and psychological disabilities which prevented him from engaging in substantial gainful employment. I so find. Claimant received sporadic medical treatment from the date compensation benefits ended until his death.

After weighing the totality of the record evidence, I conclude that Claimant's death on December 15, 2003, was due to his psychological impairment which had a causal connection to his April 2001 job injury. Accordingly, Claimant suffered from a psychological condition, so severe, that as of March 2003, Claimant was unable to work because of his psychological impairment. Claimant's inability to work due to psychological condition was caused, at least in part, by his April 2001 job injury.

Accordingly, I find and conclude that Claimant was temporarily totally disabled from April 13, 2001 to December 15, 2003, because of physical injuries sustained from his job injury consistent with the opinions of Dr. Beaudry. Claimant was also temporarily totally disabled from March 21, 2003 to December 15, 2003, because of his psychological condition attributable to his work-related accident/injury of April 13, 2001.

D. Suitable Alternative Employment

Once the employee has met his burden of establishing a **prima facie** case of total disability, the employer must then establish the existence of realistically available job opportunities, within the geographical area where the employee resides, which he is capable of performing, considering his age, education, work experience and physical restrictions, and which job he could secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), reh'g 5 BRBS 418 (1977), and Diamond M. Drilling Co. v. Kilsby, 6 BRBS 114 (1977).

If the Employer/Carrier fail to present suitable alternative employment after the Claimant has established a case of total disability, then the Claimant shall be considered to be totally disabled. Clophus v. Amoco Production Co., 21 BRBS 261 (1988), and Manigualt v. Stevens Shipping Co., 22 BRBS 332 (1989).

Employer/Carrier in the present case made no attempt to establish suitable alternative employment, but simply assert that Claimant suffered no condition after September 18, 2001 that prevented his return to work in his former job. As noted above, Dr. Beaudry opined that Claimant could not perform his former job, which is supported by the deposition testimony of Claimant and the hearing testimony of his father. In the absence of a showing that other suitable alternative employment was available in the local community, Claimant remained totally disabled after November 22, 2001. I so find.

E. Entitlement to Medical Care and Benefits

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977).

Employer and Carrier argue that they are not responsible for paying any medical treatment, after Claimant was released by Dr. McNeill in September 2001. Once an employer has refused treatment or neglected to act on claimant's request for treatment, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a

claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Because of Claimant's financial difficulties, he was unable to obtain necessary physical or psychological treatment, and he refused to continue to allow his father to pay for such treatment. Dr. Beaudry, however, testified that Claimant needed continuing treatment in the form of epidural steroid injections and pain management for his on-the-job injury which resulted in chronic pain. Additionally, Dr. Jones believed that in April 2003, Claimant still needed to see an orthopedist for his 2001 injury. Unfortunately for Claimant, Dr. Beaudry's request to proceed with epidural blocks and pain management was denied by the insurance carrier.

In the present matter, Claimant seeks an order that Employer/Carrier be required to pay for all medical expenses Claimant incurred between November 23, 2001 and December 15, 2003. Upon review of the record, it appears that Claimant seeks reimbursement for medical expenses in the amount of $778.04 for expenses incurred, plus interest therein. I so find and conclude.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, the parties stipulated that Employer/Carrier filed a notice of controversion on June 4, 2001. Employer and Carrier further unilaterally suspended benefits to Claimant on November 23, 2001, for which I find he was entitled. In accordance with section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due, which the record established to be May 10, 2001.[4] Thus, Employer was liable for Claimant's total disability compensation payment on June 7, 2001.

[4] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). Consequently, this Court finds and concludes that Employer did filed a timely notice of controversion on June 4, 2001 and is not liable for Section 14(e) penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

Here, Claimant is entitled to a back award of disability benefits. Therefore, Claimant should be awarded interest on all payments not actually tendered as of the above date of calculation, to include medical reimbursements. The appropriate rate shall be determined by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District

Director to submit an application for attorney's fees.[5] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant or his Estate compensation for temporary total disability from November 23, 2001 to December 15, 2003, based on Claimant's average weekly wage of $675.05, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 13, 2001, work injury, to include expenses related to his psychological condition, consistent with this Decision and Order, pursuant to the provisions of Section 7 of the Act.

3. Employer shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

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[5] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 13, 2003**, the date this matter was referred from the District Director.

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 29th day of September, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge